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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 349

CARLOS M. DE CASTRO,

Petitioner,

vs.

BOARD OF COMMISSIONERS OF SAN JUAN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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vs.

BOARD OF COMMISSIONERS OF SAN JUAN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

Your petitioner, Carlos M. de Castro, of San Juan, Puerto Rico, prays a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals, First Circuit, entered on June 14, 1943, in the cause entitled Carlos M. de Castro, Petitioner, versus Board of Commissioners of San Juan, Respondent, (No. 3796) affirming the judgment of the Supreme Court of Puerto Rico by which execution of a former judgment in favor of the petitioner was ordered stayed.

The term for filing a petition for a writ of certiorari does not expire until September 14, 1943. Section 8 of the Act of February 13, 1925 (28 U. S. C. A. 350).

A stay of execution was granted by the Court below to enable the petitioner to apply for a writ of certiorari to this Honorable Court.

Summary Statement.

The petitioner, Carlos M. de Castro, was temporarily appointed City Manager of the Capital of Puerto Rico on February 4, 1937, pursuant to Section 21 of Act No. 99, Laws of Puerto Rico 1931, page 639 (Former Record, p. 46-47). The Board of Commissioners, after hearing upon charges against De Castro, removed him from office on April 5, 1939. The District Court of San Juan upheld the Board, and, on certiorari proceedings to review, the Supreme Court of Puerto Rico, on June 28, 1940, reversed the judgment of the District Court and ordered the reinstatement of the petitioner to date back to January 5, 1939 when he was suspended from office and pay, (R. 1-11).

The respondent took an appeal to the Circuit Court of Appeals for the First Circuit which affirmed the judgment of the Supreme Court of Puerto Rico on January 10, 1941. *Board of Commissioners of San Juan* v. *De Castro*, 116 F. (2d) 806. Certiorari was denied by this Hon. Court on October 18, 1943, 314 U. S. 614.

The entire record of the appeal to the Circuit Court and certiorari proceedings before the Supreme Court of the United States appear under docket number 94, October Term 1941. For a comprehensive statement of our case, we shall have to refer both to the former record before this Honorable Court and to the record of the Circuit Court, in the later proceedings, which gave rise to this petition for certiorari. To distinguish between the two records we shall refer to the first as the Former Record.

A short time after the mandate of the Circuit Court was sent to the Supreme Court of Puerto Rico, on October 27, 1941, the respondent filed a motion to stay execution of the

judgment of June 28, 1940, insofar as it ordered the reinstatement of the petitioner (R. 12 to 18).

The petitioner filed an opposition to the motion to stay (R. 19 to 36), and after hearing thereon, the Supreme Court of Puerto Rico on January 14, 1942, entered a second judgment finding that "the tenure of office of the city manager is that of four years, provided that during the same he observe good behavior", and consequently decreeing that the petitioner's term of office, having expired on the second Monday of February 1941, the motion to stay execution should be granted and the judgment of June 28, 1940, stayed insofar as it ordered the reinstatement of the petitioner (R. 36 to 46).

The petitioner filed an elaborate motion to reconsider pointing out the errors of the Supreme Court of Puerto Rico in its second judgment January 14, 1942 but the same was denied without hearing on opinion (R. 47 to 66).

An appeal was taken by the petitioner, to the United States Circuit Court of Appeals for the First Circuit, under the provisions of Section 128 of the Judicial Code of the United States (28 U. S. C. A. 225). On June 14, 1943, the Circuit Court affirmed the judgment of the Supreme Court of Puerto Rico of January 14, 1942, from which the petitioner is requesting a review by certiorari. In affirming the judgment of the Supreme Court of Puerto Rico, the Circuit Court, though with full conviction of the error committed by the lower court, found itself constrained to affirm and stated in its opinion:

> "The interpretation put upon the Act by the local political parties and by the successive boards of commissioners would be a relevant consideration in determining the construction of the Act, if the Act itself is deemed to be doubtful or ambiguous in meaning.
>
> "If we were free to take a wholly independent view of the point at issue we would be inclined to conclude

that the meaning of S 21 is clear, and that the court below went beyond the permissible limits of interpretation in reading the clause "and shall hold office during good conduct" as meaning that "the tenure of office of the city manager of the capital is that of four years, provided that during the same he observe good behavior." But in Bonet *v.* Texas Co., 308 U. S. 463, 471 (1940), the court said:

"To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation. Nor would it be enough that the Puerto Rican tribunal chose what might seem, on appeal, to be the less reasonable of two possible interpretations. And such judgment of reversal would not be sustained here even though we felt that of several possible interpretations that of the Circuit Court of Appeals was the most reasonable one. For to justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous."

"We are not prepared to say that the judgment now under review is "inescapably wrong". For many years this court has not had much luck in reversing the Supreme Court of Puerto Rico on questions of local law. As we pointed out in de la Torre *v.* National City Bank, 110 F. (2d) 976, 983 (1940), "though Congress has given us appellate jurisdiction over the Supreme Court of Puerto Rico in matters of local law where the value in controversy exceeds $5,000, the exercise of this jurisdiction is so restricted by the canon prescribed by the Supreme Court of the United States that appeals in such cases are likely to be futile and merely to cause needless delay and expense."

"It may be pointed out that our function in this class of cases, technically, at least, is different from that of the Supreme Court of the United States upon review of decisions of state courts. There, the Supreme Court

has no appellate jurisdiction in matters of state law, and hence it accepts as conclusive the decisions of the state tribunals in matters of local law. But Congress has given us, and the Supreme Court of the United States upon certiorari, appellate jurisdiction over the Supreme Court of Puerto Rico in matters of local law where the jurisdictional amount is involved. It may well be that as a matter of legislative policy we ought not to have this jurisdiction; the present case is a good example, involving as it does a political matter of strictly local concern in San Juan, Puerto Rico. But as the law now stands litigants bring these cases to us as a matter of right, and we have to pass on them. It is a bit humiliating to this court to be obliged to act practically as a rubber stamp, or else to be reversed by the Supreme Court of the United States.

"Incidentally, we have two lines of appellate jurisdiction from Pureto Rico, one from the United States District Court for Puerto Rico and the other from the Supreme Court of Puerto Rico. 28 U. S. C. S. 225. Appeals from the District Court may involve questions of local Puerto Rican law; so far as we know, the "inescapably wrong" rule has never been applied in such cases. Suppose, upon such an appeal, we should decide a question of local law which had never been passed upon by the Supreme Court of Pureto Rico, and that subsequently, in other litigation, the same question should come before that court. Would it be "inescapably wrong" if it should refuse to follow our previous ruling on the point? Or is the Supreme Court of Pureto Rico free in such a case to make its own interpretation of the local law, brushing aside an earlier decision of this court, which on the face of 28 U. S. C. S. 225 has appellate jurisdiction over it?

"We have gone into this case at such length not in any spirit of complaint, because we recognize that the Supreme Court of the United States applies to itself the same self-denying canon which it imposes on us; and it may be a good thing. But to save future litigants from disappointment and futile expense, we wish

to reiterate that our appellate jurisdiction in this class of cases is pretty much of a dead letter.

"The judgment of the Supreme Court of Puerto Rico is affirmed, with costs to the appellee."

The petitioner consistently asserted before the Supreme Court of Puerto Rico, and before the Circuit Court, that Section 21 of the Puerto Rican statute, being clear in its meaning and intent, the tenure of office of the City Manager is during good behavior and not for a term of four years. It was therefore a grave error of the Puerto Rican Supreme Court to seek a different interpretation by extrinsic means, such as judicial notice of isolated facts, or otherwise by means of evidence in a Court which has only appellate jurisdiction.

The former record shows that it was an accepted fact that the petitioner's term of office was during good behavior (Former R. 20-43, 46-184).

The petitioner raised the question of lack of jurisdiction of the Supreme Court of Puerto Rico to amend its first judgment of June 28, 1940, in order to amplify its terms and include the interpretation of Section 21 of the Puerto Rican law (R. 21-22-23-24-26-34-35-36). In its motion to reconsider the additional or amending judgment of the Supreme Court of Puerto Rico of January 14, 1942 (R. 47 to 66), the petitioner again insisted that the court lacked jurisdiction to amend a former judgment by incorporating thereto matters which the court held had not been at issue and thus depriving the petitioner of due process in the conduct and decision of his case.

The Circuit Court dismissed our contention of lack of jurisdiction and violation of petitioner's rights to a fair and just proceedings, basing its finding, on a premise which it later repudiates. The Circuit Court states "If the Court below was correct in its conclusion that appellant's term of

office expired at some time subsequent to its judgment of June 28, 1940, ordering appellant's reinstatement, we think it manifest that the court had jurisdiction to stay the execution of its judgment insofar as it decreed reinstatement, despite the fact that said judgment had been affirmed by this Court. See Puerto Rican Code of Civil Procedure, Section 7, Subdivision 8." (Opinion Circuit Court R. 81).

Conversely, if the lower court was not correct in its conclusion, as held by the Circuit Court in the portion of the opinion above transcribed, we must perforce reach the inevitable conclusion, asserted at all times by the petitioner, that the Supreme Court could not amend its judgment of June 28, 1940, because to do so, would first require the determination of a question which both the Supreme Court of Puerto Rico and the Circuit Court stated had never been the subject of issue and consideration. (R. 38), Opinion of Court below R. 82.

Jurisdiction of the Court.

The basis of jurisdiction of the Supreme Court of the United States is found in the provisions of Section 240 (a) of the Judicial Code of the United States, 28 U. S. C. A. 347.

The Statute of Puerto Rico involved in the consideration of this petition is Act No. 99 of May 15, 1931, Laws of Puerto Rico 1931, page 626, and particularly Sections 21 and 22 which read as follows:

"Section 21.—The City Manager shall be the chief executive of the Capital; he shall be appointed by the Board of Commissioners created by this Act and shall hold office during good conduct.

"Section 22.—The City Manager may be removed by the Board of Commissioners, for just cause, upon hearing and opportunity to defend himself either in person or through attorneys. The following shall be causes for

the removal of the City Manager: Any act of his constituting a felony; any act of his constituting a misdemeanor and implying moral turpitude; or carelessness, inexcusable negligence in the performance of his duties, or immoral or incorrect conduct in the exercise thereof."

The judgment of the United States Circuit Court of Appeals sought to be reviewed by this petition was rendered on June 14, 1943. (R. 93).

Questions Presented.

1. The Circuit Court of Appeals erred in holding that under the Puerto Rican Code of Civil Procedure, Section 7, Subdivision 8, the Supreme Court of Puerto Rico could amend its prior judgment of June 28, 1940, so as to interpret the clear context of Article 21 of Act No. 99 of the Legislature of Puerto Rico and limit the petitioner's right to office, from that of tenure during good behavior to a four year term, thereby sanctioning a departure by the Insular Court from well established, accepted, and usual judicial proceedings.

2. Though the Circuit Court of Appeals found that the lower court "went beyond the permissible limits of interpretation" in holding that the term of office of the petitioner was that of four years instead of during good behavior, as provided in Section 21 of the Statute, nevertheless, the judgment of the lower court is affirmed because the appellate court was not prepared to hold that such interpretation is "inescapably wrong", notwithstanding that the error of the lower court was clear or manifest and its decision patently erroneous.

3. The Circuit Court of Appeals places an unduly strict, limited and harsh interpretation on the decision in *Bonet* v. *Texas Co.*, 308 U. S. 463, 471, thereby enjoining all appeals

from the Supreme Court of Puerto Rico, which are expressly authorized by Section 128 of the Judicial Code of the United States (28 U. S. C. A. 225), as a matter of right, when the interpretation of, or action under a local Puerto Rico law is involved.

Reasons Relied On for the Allowance of the Writ.

This case involves an important question of interpretation of statutes. The Supreme Court of Puerto Rico has deviated from the generally accepted and usual course of proceedings, both in the Federal and State jurisdictions, and has been permitted to do so by the decision rendered by the Circuit Court. It is a universal canon of construction that when a statute is clear in its wording and meaning there is nothing to interpret and the words and their meaning must be given their usual force and effect.

The instant case does not deal with various possible interpretations to Section 21 of the Puerto Rican statute thereby enjoining the Circuit Court of Appeals from disturbing the criterion of the Supreme Court of Puerto Rico even though said Court "may have chosen what might seem to be the less reasonable of two possible interpretations" in accordance with the doctrine outlined by this Hon. Court in *Bonet* v. *Texas Co.* cited in the Circuit Court's opinion, with reference to appeals from the Puerto Rican Supreme Court. In our modest opinion, only one possible logical and fair interpretation can be given to Section 21 of the Puerto Rican statute, and that is the one given by the Circuit Court, which, notwithstanding, affirmed the Supreme Court's judgment on the very limited and harsh interpretation given by it to the *Bonet* case and to this Honorable Court's meaning and intent upon establishing said doctrine.

It is of vital importance to litigants and attorneys in Puerto Rico that they should know where they stand with

respect to the right of appeal that is granted by Section 128 of the Judicial Code from the judgments of the Supreme Court of Puerto Rico, and, that this Hon. Court, once and for all, affirm the position of the Circuit Court in its interpretation of the *Bonet* case, or that in view of the merits of the instant case and the resulting unfairness to the petitioner, the Court clarify the doctrine in its general application in order that all litigants in Puerto Rico may know by what test they should be guided in their appeals and in what instances the Circuit Court should intervene and reverse the Supreme Court of Puerto Rico. It is respectfully submitted that, apparently, the only guide or test at present is the *Bonet* case in which this Hon. Court has stated that in order to justify a reversal in cases of the interpretation of a local statute by the Supreme Court of Puerto Rico, "the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous". This test is apparently not a sufficient guide to the court below as evidenced by the opinion rendered. The Circuit Court practically closes the doors of the appellate court to Puerto Rican litigants, and, unintentionally, discriminates in favor of those fortunate persons who through diversity of citizenship, can take their cases to the United States District Court for Puerto Rico.

In the interest of litigants, attorneys, and in a spirit of a more sympathetic approach to the rights of litigants of Puerto Rico under the Constitution and the Organic Act of Puerto Rico in matters of local concern we feel that the instant case merits review by this Hon. Court.

WHEREFORE your petitioner prays that a writ of certiorari be granted herein and that the final judgment of the Circuit Court of Appeals for the First Circuit, in the case entitled *Carlos M. de Castro, Petitioner* v. *Board of Commissioners*

of San Juan, Respondent, No. 3796, affirming the judgment of the Supreme Court of Puerto Rico, be reversed.

San Juan, Puerto Rico, July 30th, 1943.

HUGH R. FRANCIS,
Attorney for the petitioner.

GABRIEL DE LA HABA,
Of Counsel.

I hereby certify: That the foregoing petition, in my opinion, is well founded and entitled to be considered by this Court, and, further, that it is filed in good faith and not for the purpose of delay.

San Juan, Puerto Rico, July 30th, 1943.

HUGH R. FRANCIS.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 349

CARLOS M. DE CASTRO,

Petitioner,

vs.

BOARD OF COMMISSIONERS OR SAN JUAN.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Judgments and Opinions of the Courts Below.

The opinion and judgment of the Supreme Court of Puerto Rico, rendered on June 28, 1940, is not reported in English. It appears in the Spanish edition of the Puerto Rico Reports in 57 D. P. R. 153, and in the Record, pages 1 to 11.

The second opinion and judgment of the Supreme Court of Puerto Rico, rendered January 14, 1942, has not been reported in English and appears reported in the Spanish Edition, 59 D. P. R. page 676. It appears in the Record, pages 36 to 46. The opinion of the Circuit Court of Appeals for the First Circuit rendered June 14, 1943, is not reported and will be found in the record, pages 80 to 93.

Jurisdiction.

The jurisdiction of this Hon. Court is invoked under the provisions of Section 240 a of the Judicial Code of the United States, as amended by the Act of Congress of February 13, 1925, C. 229, 43 Stat. 938 (28 U. S. C. A. 347).

The judgment of the Circuit Court of Appeals for the First Circuit was entered on June 14, 1943, and a petition for writ of certiorari to this Hon. Court was filed by the petitioner on September 14, 1943, under the provisions of the above statute and Rule 38 of the Rules of this Court.

Statement.

A statement of the case is made in the petition for writ of certiorir to this Hon. Court (pp. 2-7).

The grounds for the petition, stated concisely, are as follows:

The Supreme Court of Puerto Rico rendered a judgment on June 28, 1940, in the case of Carlos M. de Castro *vs.* Board of Commissioners of San Juan, 57 D. P. R. 153, by which judgment the Board of Commissioners was ordered to reinstate De Castro as City Manager of San Juan, said reinstatement to date back from January 5, 1939, when the petitioner was suspended from office and pay (R. p. 1 to 11). The decision was appealed to the United States Circuit Court, First Circuit, by the Board of Commissioners and there affirmed (116 F. (2d) 806). Certiorari was denied by the Supreme Court of the United States on October 13, 1941, 314 U. S. 614.

Shortly after the mandate was received in the Supreme Court of Puerto Rico, the defendant, Board of Commissioners of San Juan, filed a motion to stay the execution of the judgment insofar as the same ordered the reinstatement of the petitioner De Castro (R. p. 12 to 18). The petitioner

opposed this motion before the Supreme Court (R. p. 19 to 36).

The Supreme Court of Puerto Rico rendered a judgment and opinion declaring that the tenure of office of the petitioner De Castro, as City Manager of San Juan, had terminated in February 1941, and therefore, granted a motion to stay execution of the judgment. Carlos M. de Castros *vs.* Board of Commissioners, 59 D. P. R. p. 676 (R. p. 36 to 46).

The petitioner De Castro filed a motion to reconsider the judgment of the Supreme Court of January 14, 1942 (R. p. 47 to 66). Without a hearing thereon, the Supreme Court of Puerto Rico denied the motion to reconsider and the petitioner took an appeal to the United States Circuit Court of Appeals for the First Circuit on April 13, 1942, and on June 14, 1943, the Court below rendered its opinion and judgment affirming the judgment of the Supreme Court of Puerto Rico (R. p. 80 to 93).

The petitioner consistently argued before the courts below that the Supreme Court of Puerto Rico was without jurisdiction to amend its judgment of June 28, 1940, by the second judgment of January 14, 1942, so as to incorporate in the latter a matter, which if at issue when the first judgment was rendered, became *res judicata*, and if not at issue would render the second judgment null and void because of the fact that under Section 7, subdivision 8 of the Puerto Rican Code of Civil Procedure only clerical errors or misprisions could be amended, and the change introduced by the Supreme Court of Puerto Rico into its first judgment by that of January 14, 1942, did not consist of amendments of clerical errors or misprisions but of a fundamental matter which changed the issue of the question that the court states was before it.

The petitioner also contended before the courts below that the Supreme Court of Puerto Rico, in order to amend its first judgment of June 28, 1940, by the second judgment

of January 24, 1942, made an interpretation of Section 21 of the Act creating the Government of the Capital of Puerto Rico approved May 15, 1931, Laws of Puerto Rico 1931, page 626, which is contrary to the clear meaning and intent of the statute and contrary to all accepted rules of interpretation. This Section reads as follows:

> "Section 21. The City Manager shall be the chief executive of the Capital; he shall be appointed by the Board of Commissioners created by this Act and shall hold office during good conduct."

The Supreme Court of Puerto Rico held that the meaning of the statute quoted is that the City Manager of San Juan holds office for a term of four years provided during the same he observe good behavior (R. p. 45).

In deciding the case, the Court below, although granting that the Supreme Court of Puerto Rico went beyond the permissible limits of interpretation in reading into the statute a meaning which departed from the true and correct interpretation of the clear wording thereof, and that the evidence of judicial notice upon which the Supreme Court of Puerto Rico based its opinion would have been proper only in the event that the Act itself should be deemed to be doubtful or ambiguous in meaning, nevertheless, the Circuit Court affirmed the judgment on the ground that it was not prepared to say that the judgment under review was inescapably wrong and that it was enjoined from reversing the Supreme Court of Puerto Rico in appeals taken on questions of local legislation (28 U. S. C. A. 225), on the grounds stated by this Hon. Court in *Bonet* v. *Texas Co.*, 308 U. S. 463.

Regardless of the interpretation placed by the Court below on the *Bonet* case, the petitioner contended before the courts below that he was being deprived of the right to due process of law because of the fact that the Supreme Court of Puerto Rico lacked jurisdiction to amend its judgment

of June 28, 1940, by the additional or supplementary judgment of January 14, 1942, because to do so the Supreme Court of Puerto Rico had to first make an interpretation of Section 21 of the Act of May 15, 1931, which itself and the court below, declared in their opinions that the interpretation of this section had not been the subject of consideration or issue when the first judgment was rendered (R. p. 38 to 81).

If the matter was being decided for the first time by the Supreme Court of Puerto Rico in its judgment of January 14, 1942 and had not been part of the issues of the case when the first decision was rendered on June 28, 1941, it appears clear, that the Supreme Court of Puerto Rico went beyond the scope of its jurisdiction to amend, under the provisions of Section 7, subdivision 8 of the Code of Civil Procedure of Puerto Rico, which is identical with Section 128, Subdivision 8 of the California Code of Civil Procedure, under which, after the entry of a final judgment the power to change is gone and any further judgment, or order, materially varying the judgment is a nullity, since the Court is without jurisdiction.

Specification of Errors Urged.

1. The Circuit Court of Appeals erred in holding that under the Puerto Rican Code of Civil Procedure, Section 7, subdivision 8, the Supreme Court of Puerto Rico could amend its prior judgment of June 28, 1940, so as to interpret the clear context of Article 21 of Act No. 99 of the Legislature of Puerto Rico and limit the petitioner's right to office, from that of tenure during good behavior to a four year term, thereby sanctioning a departure by the Insular Court from well established, accepted, and usual judicial proceedings.

2. Though the Circuit Court of Appeals found that the lower court "went beyond the permissible limits of interpre-

tation" in holding that the term of office of the petitioner was that of four years instead of during good behavior, as provided in Section 21 of the Statute, nevertheless, the judgment of the lower court is affirmed because the appellate court was not prepared to hold that such interpretation is "inescapably wrong", notwithstanding that the error of the lower court was clear or manifest and its decision patently erroneous.

3. The Circuit Court of Appeals places an unduly strict, limited and harsh interpretation on the decision in *Bonet* v. *Texas Co.*, 308 U. S. 463, 471, thereby enjoining all appeals from the Supreme Court of Puerto Rico, which are expressly authorized by Section 128 of the Judicial Code of the United States (28 U. S. C. A. 225), as a matter of right, when the interpretation of, or action under a local Puerto Rican law is involved.

Argument.

Point One.

The Circuit Court of Appeals erred in holding that the Supreme Court of Puerto Rico could amend its judgment of June 28, 1940, by the second judgment rendered on January 14, 1942, under the provisions of Section 7, Subdivision 8 of the Puerto Rican Code of Civil Procedure.

The Section and subdivision cited from the Puerto Rican Code of Civil Procedure, 1933 Edition, reads as follows:

Section 7. (128 Cal.) Every court has power:

* * * * * * *

8. To amend and control its process and orders so as to make them conformable to law and justice.

This Section is identical with Section 128, subdivision 8, of the California Code of Civil Procedure which reads as follows:

> Section 128. Powers Respecting Conduct of Proceedings. Every court shall have power:
>
> . . . . . .
>
> 8. To amend and control its process and orders so as to make them conformable to law and justice.

Kerr's Cyclopedic Code of California Vol. 3, Part I, Sect. 7.

Under this statute, only clerical errors or misprisions can be corrected, and no new matter can be introduced into a judgment by way of amendment.

First National Bank v. *Dusy*, 110 Cal. 69.
O'Brien v. *O'Brien*, 124 Cal. 422.
In re *Kamp*, 59 New York 212.
United R. R. Co. v. *Court*, 170 Cal. 755.
McConville v. *Sup. Court*, 78 Cal. App. 203, 248 Pac. 553.
Los Angeles v. *Sup. Court*, 94 Cal. App. 433, 271 Pac. 363.
Calkins v. *Monroe*, 17 Cal. App. 324, 119 Pac. 680.
Crenshaw Bros. v. *Southern Pac.*, 42 Cal. App. 44, 123 Pac. 208, 250 U. S. 669, 63 L. Ed. 1198, Cert. denied.
Guillespie v. *Andrews*, 78 Cal. App. 599, 248 Pac. 715.

After the entry of a final judgment the power of a court to change is gone, except as it may be authorized by the rules governing amendments and the Code provisions for conforming the conclusions and judgment to the findings of fact. Any further judgment, or order, materially varying the judgment is a nullity since the Court is without jurisdiction.

Bank v. *Dodson*, 127 Cal. 208;
White v. *White*, 130 Cal. 597;
Consolidated Const. Co. v. *Pac. Electric Ry.*, 184 Cal. 244.

Proceedings for amendment of a judgment should not be permitted to become revisory or appellate in their nature, and, ought never to be the means of modifying or enlarging the judgment or the judgment record so that it shall express something that the Court did not pronounce even though the proposed amendment embraces matter which clearly could or even should have been pronounced.

Leonis v. *Leffingwell*, 126 Cal. 369;
Estate of Potter, 141 Cal. 424;
Takawa v. *Hale*, 170 Cal. 323;
Haime Piano Co. v. *Bloomer*, 193 Cal. 398;
Mann v. *Mann*, 6 Cal. App. 610, 92 Pac. 740.
Forrester v. *Lawler*, 14 Cal. App. 170, 111 Pac. 284.

Those matters as to which the power of amendment extends are ordinarily described as clerical errors or misprisions, as distinguished from judicial errors which are not amendable. *Fay* v. *Stubenranch*, 141 Cal. 573.

In denying the petitioner's opposition to the amendment by way of interpretation of new matter, and in deciding that under Section 7, subdivision 8 of the Puerto Rican Code of Civil Procedure it had complete jurisdiction to amend its former judgment, the Supreme Court of Puerto Rico was apparently unaware of the fact that its own interpretation of Section 7 conforms to the general interpretation of the courts, specially those of California. A similar question was decided by our Supreme Court and the authority of the decision has stood since the year 1913. We refer to the case of *Marvin & Jones Inc.* v. *Torres*, 19 P. R. R. 46, in which the Court restates the doctrine that a judgment can-

not be, fundamentally amended under the provisions of Section 7, subdivision 8 of the Code of Civil Procedure of Puerto Rico, and can only be changed when the purpose of such change is to correct a clerical error or an involuntary omission to conform the judgment to the record. We see no reason why the Court below should have reported from its former decision when it conforms to the universally accepted procedure.

This doctrine is uniformly accepted in all the western States that have provisions similar to those contained in the California and Puerto Rican codes. See Bancroft's Code Practice and Remedies, Vol. 3, Sec. 1832.

In the above particular the Court below has sanctioned a departure by the Supreme Court of Puerto Rico from the generally accepted and usual course of legal proceedings, and in its judgment, dismisses the petitioner's contention of lack of jurisdiction to amend, basing its findings on a premise which it later repudiates when it says: "If the court below was correct in its conclusion that the appellant's term of office expired at sometime subsequent to its judgment of June 28, 1940, ordering appellant's reinstatement, we think it manifest that the court had jurisdiction to stay the execution of its judgment insofar as it decreed reinstatement, despite the fact that said judgment had been affirmed by this Court. See Puerto Rican Code of Civil Procedure, Section 7, subdivision 8" (R. p. 81). However, the court below holds that the evidence of judicial notice accepted by the Supreme Court would have been relevant if the act itself could be considered doubtful or ambiguous in meaning, and concludes, that the Supreme Court of Puerto Rico went beyond the permissible limits of interpretation in reading the clause "and shall hold office during good conduct" as meaning that the tenure of office of the City Manager of the Capital is that of four years, provided that during the same he observe good behavior (R. p. 91).

There does not seem to be great consistency between this opinion of the court below as to the propriety of the interpretation placed by the Supreme Court of Puerto Rico on Section 21 of the Act of May 15, 1931, and its statement that "if the court below was correct in its conclusion that appellant's term of office expired at sometime subsequent to its judgment of June 28, 1940 * * *, that court had jurisdiction to stay the execution of its judgment * * *. See Puerto Rican Code of Civil Procedure, Section 7, subdivision 8".

If the Supreme Court of Puerto Rico erred in its interpretation of Section 21 of the Statute, then clearly, under Section 7, subdivision 8 of the Puerto Rican Code of Civil Procedure, as interpreted in the case of *Marvin & Jones Inc.* v. *Torres* and the California cases cited, the court had no jurisdiction to amend its former judgment of June 28, 1940, and the petifioner was deprived of his constitutional right of due process of law.

It appears then that the error committed by the Supreme Court of Puerto Rico was "clear or manifest; the interpretation inescapably wrong; the decision patently erroneous," fully meeting the test set out by this Hon. Court in *Bonet* v. *Texas Co.*, 308 U. S. 463.

Point Two.

The Circuit Court of Appeals erred in holding that the Supreme Court of Puerto Rico could amend its judgment rendered on June 28, 1940, by the second judgment rendered on January 14, 1942, under the provisions of Section 7, subdivision 8 of the Puerto Rican Code of Civil Procedure.

The Court below states in its opinion that the Supreme Court of Puerto Rico went beyond the permissible limits of interpretation in declaring that Section 21 of the Act of

May 15, 1931, should be interpreted to mean that the City Manager of the Capital held office for four years, provided that during the same he observe good behavior. (R. p. 91). However, the court below states that it was not prepared to say that the judgment under review was inescapably wrong. (R. p. 91).

The term "during good behavior" as applying to the tenure of office, is clear and free from all ambiguities. It is contained in article III, Section 1 of the Constitution of the United States which reads:

> The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

It has been held to mean a tenure for life, unless sooner terminated for cause.

> Cf. *Matter of Hennen*, 13 Pet. 230, 258 (1839).
> *Smith* v. *Bryan*, 110 Va. 199, 203; 40 S. E. 652, 653.

The decision of the Supreme Court of Puerto Rico is apparently based on a false misconception regarding Section 21 of the Act, for, whereas the Act is clear and unambiguous in its meaning, the Court attempts to interpret its meaning on the basis of ambiguity or lack of clearness. (See R. p. 39, 41, 42 and 43.).

The Supreme Court of Puerto Rico attempts to draw a parallel between the *De Castro* case and that of *Shurtleff* v. *United States*, 180 U. S. 311, 316 (1903). The court below does not accept the similarity between the two cases. (R. p. 87, 88).

When the petitioner complained to the court below that the Supreme Court of Puerto Rico should not have considered evidence of judicial notice without affording him an opportunity to present other evidence, of judicial notice, or otherwise, the court below intimates that the appellant did not enlighten the court on these matters. The petitioner has always felt that the proceedings before the Supreme Court of Puerto Rico were not original proceedings in which the introduction of evidence was proper. The fact that the Supreme Court made use of judicial notice, as evidence, necessarily limited the petitioner to this class of evidence, when, in an ordinary proceeding, the whole field of evidence would have been open to him to explain the significance of several matters to which the Supreme Court gives importance.

We feel that the court below was not justified in stating that the petitioner had "not undertaken to enlighten" the court on those matters. (R. p. 89 and foot note 4 p. 90). The record shows that in the additional grounds for opposition by the appellant De Castro, two bills that had been before the Senate of Puerto Rico were annexed as Exhibits. These bills, corresponding to the Legislatures of 1936 and 1937 clearly show that the Legislature of Puerto Rico was aware of the fact that the term of office of the City Manager was without limit and the bills were introduced for the purpose of limiting the tenure of office to four years. These bills failed to become law. (R. p. 34, 35, 36). The petitioner also accompanied to the brief before the court below, as an appendix, a certified copy of an opinion by the Attorney General of Puerto Rico, dated January 30, 1937, in which this official states that the term of office of the City Manager is during good behavior, or, in contemplation of the law, for life, unless sooner removed for cause. The court below apparently does not give any weight to this opinion which destroys the conclusion of the Supreme Court of Puerto

Rico to the effect that the petitioner himself had interpreted the statute to mean that his term of office was only for four years. (R. p. 45).

The petitioner has requested the Clerk of the Court below to furnish this Hon. Court with a certified copy of this exhibit.

To further clear up the question of judicial notice, the petitioner attaches, as appendices to this brief a certified copy of Resolution number 243 adopted by the Board of Commissioners of San Juan on September 16, 1936, and also, a certified copy of the Opinion of the Attorney General of Puerto Rico to the President of the Board of Commissioners of San Juan, dated December 8, 1936.

This official resolution of the Board tends to show that the term of office of the former city manager Mr. Benitez Castaño did not end on the first Monday of January 1937 after the general election of 1936, but continued for one hundred and fifty working days after September 12, 1936, or until the 19th of March 1936, as appears from the foot note 4 in the opinion of the Court below. (R. p. 90). The opinion of the Attorney General tends to establish the fact that the Board of Commissioners of San Juan was informed and officially aware that it could not appoint a new city manager after the election of 1936, when the new Board was to take possession, on January 4, 1937, and that according to the opinion the office of city manager did not become vacant until the effective date of the resignation of the city manager Mr. Benitez Castaño, after the lapse of 150 working days from September 12, 1936.

Point Three.

Appeals from judgments of the Supreme Court of Puerto Rico to the Circuit Court of Appeals for the First Circuit are authorized, as a matter of right, by Section 128 of the Judicial Code (28 U. S. C. A. 225).

The Court below should have entertained the appeal and rendered a decision on the merits and not affirmed the appeal on the grounds stated in its judgment.

On the arguments presented under Points One and Two we feel that this case merits revision by this Hon. Court.

The court below is practically in agreement with the petitioner on the question of the grave error committed by the Supreme Court of Puerto Rico in its interpretation of Section 21 of the Act of May 15, 1931. If that court went beyond the scope of its power and attempted to interpret a statute introducing thereto a meaning which was outside of its clear and imperative scope, the Circuit Court should have found that the case at bar met the canons or test set out by this Hon. Court in the *Bonet* case and should have declared the decision of the Supreme Court of Puerto Rico, clearly in error, inescapably wrong and patently erroneous.

The statute which creates the special government for the Capital of Puerto Rico in its Section 21, cannot be the subject of a construction or interpretation that is not derived from its own text since it is a well known rule of construction that when the text of the law is clear there is no need to search another part of the statute for matters, to clarify by interpretation, that which is clear and evident of itself and has been the subject of interpretation by the courts.

Section 388 of the Code of Civil Procedure of Puerto Rico, 1933 Edition, (Sect. 26 Law of Evidence) provides that in the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in term or in substance contained therein, not to insert what has been omitted or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted, as will give effect to all.

"There should be no construction of a statute where the language is clear and comprehensive."
U. S. v. *Wiltberger*, 5 Wheat. 76.

"A statute must be held to mean what the language imports. When it is clear and imperative, reasoning ab inconvenienti is of no avail, and there is no room for construction."
Boudinot v. *U. S.*, 11 Wall. 616.

"Where the language of a statute is transparent and its meaning clear, there is no room for the office of construction; there should be no construction where there is nothing to construe."
Lewis v. *U. S.*, 92 U. S. 618.

"The court is bound by plain and unambiguous language of a statute, and cannot alter the terms and thus enact instead of construe the law."
U. S. v. *Ewing*, 184 U. S. 142.

Section 21 of Act No. 9, of May 15, 1931, is clear and conclusive in its expression. There is no room for construction or interpretation. It may be possible that the Sections of said statute relative to the appointment and terms of office of other officers and employees of the Government of the Capital may not be completely clear. In that event their interpretation might demand judicial inquiry but the present case has nothing at all to do with the appointment and terms of office of anyone but the City Manager and these sections bearing no relation whatsoever to Section 21, consequently, they should not have been examined and construed for the purpose of determining the legislative intent which clearly appears from Section 21 itself.

The mission and duty of courts of justice is not to establish the legislative policy of a state but merely to enforce the statutes approved by legislative authority. This is in harmony with the fundamental principle of constitutional law which upholds the independence of the executive, legis-

lative and judicial branches. From time immemorial the principle has been firmly adhered to.

> "The judicial power is exercised in the decision of cases; the legislative in making general regulations by the enactment of laws. The latter acts from considerations of public policy, the former by the pleadings and evidence of the case."
>
> *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421; 59 U. S. 435.

Conclusion.

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the First Circuit, dated June 14, 1943, is clearly erroneous, and, in upholding and affirming the judgment of the Supreme Court of Puerto Rico of January 14, 1942, the petitioner has been deprived of his right to reinstatement to office without due process of law. The petitioner, therefore, prays that a writ of certiorari in the present case be ordered to issue and the judgment of the Circuit Court be reversed.

San Juan, Puerto Rico, September 3, 1943.

HUGH R. FRANCIS,
Counsel for Petitioner.

GABRIEL DE LA HABA,
Of Counsel.

APPENDIX.

December 8, 1936.

Mr. Rafael Landrón Landrón, President, Board of Commissioners, Government of the Capital, San Juan, Puerto Rico.

SIR:

I acknowledged receipt of your letter of December 2, of this year, in which you request my opinion as to whether the Board of Commissioners of the Capital, elected in the past elections held in this Island can, by virtue of the provisions of article 50 of the law creating the Government of the Capital, appoint a new city manager to take office as soon as appointed, if the person were other than the one now holding office.

You state that the City Manager of the Capital, Mr. Jesús Benitez Castaño, is now enjoying, as appears from Resolution No. 243 approved by the Board of Commissioners of San Juan, which you enclose, a vacation with pay of 150 working days, and by said resolution the resignation of said official is accepted to take effect upon termination of the leave, and that at present Mr. Bolivar Pagán is acting as Manager of the Capital.

I am sorry to inform you with respect to the above inquiry, that this office cannot render the opinion requested by you because of the fact that the members elected to the Board of Commissioners will not be able to take possessions of their offices as such until the first Monday in January, 1937, and it is to this new Board that would correspond the formulation of your consultation, in the event that it might deem the same convenient; therefore considering the inquiry made by you of a hypothetical nature for the reasons stated.

Regarding the subject of inquiry you ask in addition if the Board of Commissioners could appoint a new Manager to take office prior to the expiration of the leave granted to Mr. Benitez Castaño.

I ignore whether in mentioning the Board of Commissioners you refer to the present Board or to that elected in the

past elections. If you refer to the latter your inquiry would be hypothetical as above expressed; if on the contrary you refer to the present Board of Commissioners then I must answer your consultation in the negative, inasmuch as in accordance with Article 24 of the Law of the Capital, in the event of a leave by the City Manager of the Capital, he is replaced provisionally by one of the officers in their order of priority as they appear enumerated in Article 26 of the same law, and as a result of this, having granted a leave to the City Manager Mr. Jesús Benitez Castaño and this official being in the enjoyment of the same, the Treasurer of the Capital Mr. Bolivar Papán is acting as temporary manager and until such time as the office becomes vacant the Board has no authority to appoint a new City Manager before the expiration of the leave granted to Mr. Benitez Castaño. See Section 25 of the law cited.

Yours truly,

B. FERNÁNDEZ GARCÍA,
Attorney General.

EA/RCA/ach/eo

Rafael Cabello, File Clerk of the Department of Justice of Puerto Rico, do hereby certify:—

That the foregoing is an exact and true copy of the opinion rendered by the Attorney General of Puerto Rico to Mr. Rafael Landrón y Landrón, President of the Board of Commissioners of the Government of the Capital, as of December 8, 1936 which is on record in the files of this Department under my custody; and at the request of attorney Gabriel de la Haba I issue this copy which I sign and affix thereto the seal of the Department, on this 13th of November 1942, cancelling thereon internal revenue stamps amounting to one dollar twenty five cents ($1.25).

(Signed) RAFAEL CABELLO,
File Clerk Department of Justice.

Internal Revenue Stamps cancelled in the amount of $1.25.
(SEAL.)

RESOLUTION NUMBER 243

Granting A Leave of Absence to the City Manager Honorable Jesus Benitez Castaño, Accepting the Resignation of His Office; and for other Purposes.

Whereas, the Honorable Jesus Benitez Castaño, City Manager of San Juan, has addressed a letter to this Board of Commissioners dated September 11, 1936, which reads as follows:

> I have the honor of addressing you to inform that I have sent a letter to the Treasurer of the Capital, Mr. Bolivar Pagán requesting him, in accordance with the law which governs us, that he assume the duties of Manager of the Capital beginning tomorrow, and making known to him my decision of requesting from you a leave of absence, at the termination of which you can consider my resignation as City Manager tendered, notwithstanding that I will continue the work of terminating the report of the activities of this government for the year 1935-36, in which I will make a brief review of the work of this administration from September 11, 1931 to date.
>
> I therefore request of you to grant me a leave of absence of 150 working days, with pay, commencing tomorrow, at the end of which term my resignation as City Manager, which I now tender irrevocably, shall take effect.
>
> It seems unnecessary to state to you that if during the term of my leave my appearance is necessary for any matter of the government I will promptly come before you and render any service that may be needed to the Government of the Capital.
>
> Yours truly,
>
> (Sgd.) JESUS BENITEZ CASTAÑO,
> *City Manager of the Capital.*

Whereas, on the same date, September 11, 1936, the City Manager of the Capital, Honorable Jesus Benitez Castaño, sent to this Board of Commissioners the following letter:

As an addition to my previous letter of this date I wish to state that the principal reason that prompted me to request of Mr. Bolivar Pagán, Treasurer of the Capital that he take charge provisionally of the duties and obligations of my office as City Manager of the Capital, and request of you a leave of absence, is, that my physician, Dr. Ramon M. Suarez has recommended a prolonged rest without prejudice of my dedicating a few mements daily to the termination of the annual report corresponding to the year 1935-36 which, as I informed Mr. Pagán and you has great importance for me.

Nevertheless, as upon accepting the office of City Manager, I did so completely determined to fulfill this office until the Tuesday following the first Monday of 1937, (in this case the 4th of January 1937), above all other consideration, including my health, I am ready at any time to assume the duties of my office, if in my judgment before the concession of the leave requested this should be necessary, or in the event that you should deem it necessary to the interest of this administration after granting the same.

Hoping that you can act as soon as possible on my request for the leave requested in the afore mentioned letter of the 11th, I am,

Yours truly,

(Sgd.) JESUS BENITEZ CASTAÑO,
City Manager of the Capital.

Therefore, Be It Resolved by the Board of Commissioners of San Juan:

Section 1.—To grant, as it is hereby granted, to Mr. Jesus Benitez Castaño, the leave of absence requested by him as City Manager, effective from the 12th of September 1936 at the first hour, which will be extended for one hundred and fifty (150) working days, with pay.

Section 2.—To accept, as it is hereby accepted, the resignation presented by Mr. Jesus Benitez Castaño of his office of City Manager of San Juan, effective immediately upon termination of the leave referred to in the previous section.

Section 3.—This Board of Commissioners makes complete acknowledgment of the competent and effective work done by Mr. Jesus Benitez Castaño as Chief Executive of this Administration and wishes at the same time to give a vote of thanks to Mr. Benitez Castaño for the services rendered by him to this Government of the Capital in an honest, conscientious and constructive manner.

Section 4.—In conformity with the provisions of the law that govern this Government of the Capital, by these presents, the Honorable Bolivar Pagán is designated to fulfill the functions of City Manager of San Juan.

Section 5.—This resolution, being of an urgent nature, will take effect immediately after approval.

I, Lino Padron Rivera, Secretary of the Capital,

Do Hereby Certify:—That the preceding is a true and correct copy of the original text of the ordinance approved by the Board of Commissioners of San Juan in the extraordinary session held on September 16, 1936, with the affirmative votes of Manuel San Juan, Angel M. Pesquera, Jaime Sifre Jr., Eudardo R. Gonzáles, and the President Mr. Rafael Landrón y Landrón, as appears from the records in my custody.

As the request of attorney Gabriel de la Haba, I sign these presents and affix thereto the Seal of the Capital, at San Juan, Puerto Rico, this 3rd day of August 1943.

(Sgd.) L. Padrón Rivera,
Lino Padron Rivera,
Secretary of the Capital.

(Seal of the Capital.)

Copy. January 30th 1937

Dr. Carlos M. de Castro City Manager of the Capital San Juan, P. R.

Sir:

I am pleased to acknowledge receipt of your communication of the 9th instant requesting my opinion with respect to (1) the term of the officers and employees of the Capital which were appointed on September 11th 1931; and (2) if the new administration is or is not a continuation of the former.

From your letter it appears that the commissioners elected on the 3rd of November 1936 took possession of their offices on January 4th of the present year.

Your consultation involves the interpretation of various sections of the law establishing a special government for the Capital of Puerto Rico (Law No. 99 of the 15th of May 1931, subsequently amended), to wit:

"Section 9.—The legislative powers conferred by this Act on the Capital shall be exercised by a governmental body which shall be officially known as "Board of Commissioners of San Juan". This Board of Commissioners shall be composed of five members, who shall be appointed by the Governor of Porto Rico, with the advice and consent of the Insular Senate, for the following terms:

One Commissioner for a term of one year;
One Commissioner for a term of two years;
One Commissioner for a term of three years;
One Commissioner for a term of four years;
One Commissioner for a term of five years.

None of the first five commissioners appointed in accordance with this Act shall assume his office until his appointment has been confirmed by the Insular Senate."

"Section 10.—There are also hereby created the offices of City Manager, Treasurer, Director of Public Works, Director of Health and Charities, School Director, Auditor and Secretary of the Capital."

"Section 18.—Subject to other provisions of this Act, the Board of Commissioners shall have, among its other legislative and administrative powers, the following special powers: * * *

(5) To create such positions as may be strictly necessary for the government of the Capital, and to provide the corresponding salaries in the budget; Provided, That the Board of Commissioners may not create any department or office in addition to those herein prescribed; Provided, further, that no salary shall be paid to any employee whose position is not previously created by ordinance or resolution of the Board of Commissioners, specifying the powers and duties of such employee, and stating the need of the position for the public service; * * *"

"Section 21.—The City Manager shall be the chief executive of the Capital; he shall be appointed by the Board of Commissioners created by this Act and shall hold office during good conduct."

"Section 25.—When the office of City Manager is vacant, it shall be incumbent upon the Board of Commissioners to designate the person who shall fill said vacancy; Provided, That until the said vacancy is filled, the said office shall be discharged by a member of the Administrative Board, in accordance with the preceding section.".

"Section 26.—The City Manager shall appoint the following officers:

(1) Treasurer of the Capital;
(2) Director of Public Works;
(3) Director of Health and Charities;
(4) School Director;
(5) Secretary of the Capital.

"Section 27.—The Treasurer, the Director of Public Works, the Director of Health and Charities, the School Director, and the Secretary of the Capital may be removed by the City Manager, for just cause, upon hearing and an opportunity to defend themselves either in

person or through attorneys. The following shall be causes for the removal of said officers: Any act of theirs constituting a felony, any act of theirs constituting a misdemeanor and implying moral turpitude; carelessness, or inexcusable ignorance in the performance of their duties, or immoral or incorrect conduct in the exercise thereof."

"Section 36.—The Auditor of the Capital shall be appointed by the Board of Commissioners. This official may be removed by the Board of Commissioners for just cause, after a hearing and an opportunity to defend himself either personally or by attorneys. Causes for removal of this official shall be any act performed by him which constitutes a felony; any act performed by him which constitutes a misdemeanor and implies moral turpitude; carelessness or inexcusable negligence, or immoral and incorrect conduct in the discharge of his office.

The Auditor of the Capital shall have all the powers, functions and duties, as regards the Capital, as are vested in the Auditor of Porto Rico as regards the Insular Government of Porto Rico, subject to the provisions of the Organic Act and to such regulations, not incompatible with this Act, as the Auditor of Porto Rico may prescribe. He shall sign all warrants and orders for the payment of money from the public funds of San Juan, and shall have custody of all the real and personal property of the Capital. It shall be his duty to demand responsibility from all officers or employees of San Juan under whose immediate custody any of the Capital's property may be, and he shall immediately report to the Auditor of Porto Rico and to the Board of Commissioners any damage suffered by any city property.

The Auditor shall issue all payment warrants against funds of the Capital, and together with the Treasurer, shall sign all the checks, drafts, credit certificates and disbursements of the Capital. He shall keep the Capital's accounts with full details of all receipts and expenditures.

The Auditor may prepare, for compliance by the officers and employees of the Capital, regulations on the custody of municipal property, provided such regulations are not incompatible with the provisions of the Organic Act, of this Act, or other laws in force, or of the ordinances and resolutions of the Board of Commissioners, and he may require an adequate bond from all employees whose functions are connected with the collection of public funds. He shall render annually to the Board of Commissioners a detailed and complete report of all municipal property.

The Auditor of the Capital shall be a person competent in public accounting, and shall receive an annual salary of four thousand five hundred (4,500) dollars."

"Section 39.—All appointments of employees shall be made by the respective officers, according to the department of the Capital in which they render services. Said employees shall be appointed for the term for which each officer is appointed. The employees of the Capital may be removed for just cause by the officer appointing them, after a hearing and an opportunity to defend themselves. Any employee may be suspended from office and salary upon the preferment of charges against him by the corresponding official."

"Section 50.—The Board of Commissioners created by this Act shall be elected by popular vote at the general elections to be held in 1936, and every four years thereafter. The Commissioners appointed by the Governor of Porto Rico in accordance with section 9 of this Act shall hold office until the first Monday in January of 1937."

In accordance with the transcribed provisions, and speaking in general terms, the Government of the Capital is composed of a Board of Commissioners, which is the legislative organ, of various administrative officers who constitute the executive and administrative branch, and of those employees that may be necessary for the functioning of said government.

The Board of Commissioners is elected by popular vote every four years, except the commissioners who formed the first board, who were appointed by the Governor of Puerto Rico, with the advice and consent of the Senate and for a term which expired the first Monday of January 1937, having taken possession on this date those commissioners elected in the elections held on the 3rd of November 1936.

The appointment of the City Manager is incumbent upon the Board of Commissioners whenever said office becomes vacant, as well as the auditor of the Capital, and also the creation of such positions as may be strictly necessary, and the incorporation in the budget of the corresponding salaries. The Administrator of the Capital in turn is authorized to appoint the administrative officers, with the exception of the auditor, and to these officers correspond the appointment of the employees pertaining to their departments whose positions may have been created previously by ordinance or resolution of the Board of Commissioners.

With the exception of the term of four years which is established as the term of duration of the office of Commissioner, the law does not establish the term of duration with respect to other officers and employees of the Government of the Capital. With regard to the City Manager it is provided in Article 21 supra that he will fulfill his office during good behaviour, and with respect to the other administrative officers nothing is provided in the law, although in article 39 it is provided that the employees appointed by the Administrative officers will discharge their duties for the same term of appointment of each of such officers.

It is the general doctrine that discharge of the duties of an office or public employment is for a definite term, or while the officer and employee observe good conduct (during good behaviour), or at the will or discretion (at pleasure) of the nominating authority, unless its power to separate or discharge is limited by the law.

> "Officers and persons in public position hold, first, for a definite term; second, during good behavior; or, third, at the will or discretion of some officer or department * * * A definite term is where the law so prescribes, which may be by statute, or the organic law of

the state. 2 McQuillin Municipal Corporations, 2d Ed., p. 163."

"All offices, the tenure of which is not fixed by the Constitution or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law), during the life of the incumbent." In the matter of *Duncan N. Hennen*, 38 U. S. 202-227."

"A provision in the charter that the appointees of a certain department shall hold office during good behavior was construed to mean that such appointees shall hold office during good behavior not to exceed the limit fixed by the Constitution." *Stuart* vs. *Ellsworth*, 75 Atl. 59; McQuillin Municipal Corporations, second edition, p. 170, sec. 508 (488).

"Ordinarily in the absence of any constitutional restrictions there is no inherent objection under the American form of government to the creation of public offices with the tenure of good behavior." 22 Ruling Case Law, p. 551.

"If no definite term exists and the law does not otherwise provide, the tenure is at the will of the authority which confers the office, and unless restrained by law, the power which appoints may remove." 2 McQuillin Municipal Corporations, 2nd. Ed., p. 171.

"If no definite term is prescribed, and in the absence of legal restrictions, including civil service regulations, the incumbent holds subject to discharge at any time." 2 McQuillin Municipal Corporations, 2d. Ed., p. 172.

"When the term of tenure of a public officer is not fixed by law, the general rule is that the power of removal is incident to the power to appoint. The tenure not having been declared by law, the office is held during the pleasure of the authority making the appointment. Hence in the absence of all constitutional or statutory provision as to the removal of public officers the power of removal is considered as incident to the power of appointment." 22 R. C. L. p. 562.

"The power of appointment generally carries with it, as an incident, the power to remove, but the power of removal may be impliedly or expressly restricted by constitutional provisions or statute, and the general

rule does not apply when a definite term is attached to an office by law, or where it is provided that the officer shall hold during good behavior." 46 C. J. 985.

"Where the constitution provides that appointive officers may be removed at the pleasure of the power by which they shall have been appointed, they are removable at the pleasure of the appointing power, notwithstanding the legislature has fixed a definite term of service * * *." 46 C. J. 985.

"Where the power of removal is limited to specific causes, the removing authority may not remove for any cause not so specified. It is sometimes provided by the constitution or statute that removal shall be had for 'cause' or 'only for cause', and it is generally held that, in the absence of provisions to the contrary, officers appointed for a definite term, or to hold during good behavior, are removable only for 'cause', even though it is not so provided by statute. However, unless restricted by positive provisions of the law, the power of appointment generally carries with it, as an incident, the power to remove, at the pleasure of the appointing power, officers not holding under a term fixed by law * * *." 46 C. J. 985-986.

The law which we are now interpreting does not contain any provision authorizing the discharge of officers at the will of the nominating authority. On the contrary it limits its faculties of separating a public officer or employee from his office or employment, establishing on the contrary that the discharge must be for just cause, hearing, and opportunity for defense, personally or through an attorney at law. The City Manager may be discharged by the Board of Commissioners for the following reasons:

For any act committed by him which constitutes a grave offense (felony); any act committed by him that constitutes a minor offense (misdemeanor) and implies moral turpitude, abandonment, inexcusable negligence in the discharge of his duties or immoral or incorrect conduct in the discharge thereof. The auditor of the Capital, like the City Manager, may be discharged by the Board of Commissioners for the same causes as the other administrative officers.

Employees may be discharged by the appointing officer, for just cause, hearing, and opportunity of defense.

It results from what has been heretofore stated that the Commissioners discharge the duties of their office for a definite term of four years and that the city manager discharges his duties during good behavior, that is to say, with the character of a life tenure. It also appears that the power of discharge is limited and regulated by law and that, therefore, no other public officer or employee of the Capital discharges the duties of his office at the will of the person appointing him.

With these circumstances in view, do the appointments of the officers and employees made in September 11th 1931 upon the inauguration of the new system of government for the Capital of Puerto Rico participate of the nature of a life tenure? We are inclined to decide that it was the intention of the legislator to give such a character to said offices and position, more so, when the law does not fix a definite term of duration and limits the discharge to certain causes and to certain procedure.

Apart from these another reason exists which sustains our conclusion, and this is, that the administrative officers of the capital are not agents of the City Manager or of the Board but of the political and juridic corporation known as the Capital of Puerto Rico.

> "Though a public employment be without term and at will it does not necessarily follow that it is conterminous with the expiration of the term of office of the appointment power. To do so the employment must create the relation of principal and agent between the appointing power and the appointee. This situation is best illustrated in the case of deputies to executive officers where the courts have held that a deputy is a mere adjunct of the appointing power and hence his employment or term of office ceases with the expiration of the term of office of the appointing power. A deputy is defined as one 'who by appointment exercises an office in another's right, having no interest therein but doing all things in his principal's name and for whose misconduct the principal is answerable.' 9

A. & E. Ency. L. 369. 'A Deputy * * * is in law deemed an agent.' Story on Agency, Sec. 149, note, cited in *Harring* v. *Lee*, 22 W. Va. 661, 667. Hence the term of office of the deputy, upon principles of agency, is conterminous with the expiration of the office of his principal. (See *Greenwood* v. *The State*, 17 Ark. 332, 338, *Wilson* v. *Russell*, 31 N. W. (Dak.) 645, 650; *Boardman* v. *Halliday*, 10 Paige (N. Y.) 223, 230; *Hord* v. *State*, 70 N. E. (Ind.) 916, 922 and cases cited." *Ahia* v. *Cain*, 27 Haw. 770.)

"This statute does not in terms fix any specified period during which an appointment to the office of superintendent of the poorhouse and farm continues. But the same is also true of the offices of deputy clerk and deputy sheriff, the appointments to which continue during the pleasure of the clerk or the sheriff making the appointment. Yet it has never been doubted, so far as we are aware, that the term of a deputy sheriff or deputy clerk ends by operation of law with the term of the sheriff or clerk by whom he was appointed. The clerk and sheriff being charged with the general responsibility for the conduct of their respective offices, it is so plain that a deputy appointed by a predecessor should not hold over it was deemed unnecessary to say that the term of the deputy should end with the term of the clerk or sheriff who appointed him. So it is with the office of superintendent of the poorhouse and farm. The county board of commissioners are by law made responsible for the general supervision of the poorhouse and farm of the county, and it was never intended that the subordinate officer, appointed by them for the superintendence of the institution should have a longer term than those by whom he was appointed. The statutory scheme of general supervision by the board and subordinate supervision by the superintendent repels the idea of one board having the power to impose a superintendent on a succeeding board." *Sanders* v. *Belue*, 58 S. E. 764.

This doctrine dispels any doubt that may exist on the question that if by reason of the resignation of the former

City Manager Mr. Jesús Benitez Castaño, all the Administrative officers appointed by him ceased in the discharge of their duties.

Although true that the City Manager, as Chief Executive of the Government of the Capital, has the direction and general superintendence of all the officers of the Capital, as well as the inspection and superintendency of all public services, the administrative officers have powers and duties delegated to them by law which they exercise, not as agents of the City Manager, but as agents of the public corporation known as The Capital of Puerto Rico. The City Manager is not responsible for the negligence of said public officers in the discharge of their duties, but the corporation is, and therefore, said officers are not agents of the City Manager but his auxiliaries (adjuntos) in the current and ordinary sense of the word.

Finally we must bear in mind that the system of government of the Capital was adapted from the system in use in various States of the United States, of which the city of Dayton, Ohio, is a typical example.

This system of government (Council Manager system) requires men of experience in municipal functions that can manage efficiently all the services for the common beñefit. In order to obtain this class of officers the establishment of the administrative profession is necessary, and for this purpose it is in turn required that municipal offices should not have a definite term of duration, that the officers be appointed instead of being elected, and that they favor a non partisan administration.

By virtue of the foregoing it is my opinion that the administrative officers of the Capital appointed September 11th 1931, upon the inauguration of the new system of government for the Capital, and to whom the law does not fix a definite term of duration, were appointed during good behavior, are not subject to separation at the will or discretion of the City Manager but only for the causes specified in the law through charges, hearing, and opportunity of defense, personally, or by means of an attorney at law.

Applying the principles outlined in the course of this opinion to the employees of the Capital of Puerto Rico, referred to in Article 39 of the law, we understand that these

employees cease in their employment upon the ceasing of the officer who appointed them, for the reason that generally, said employees are in fact the agents through which the administrative officer exercises the powers, prerogatives and duties assigned to him by law, and these officers are responsible for the negligence of their employees in the discharge of their duties. Their positions are the creation of the Board of Commissioners which in turn fixes the powers and duties of their employment, the salary of the employee, and the necessity of the position for the public service.

> "The specific period may be inferred from the nature of the office and the duties of the officer. For example, when an inferior office is created, the tenure may be implied to be the same as that of the superior office to which the inferior is an adjunct. Such an implication is especially strong when the inferior officer is charged with minor matters; the general supervision and responsibility devolving on the superior officer." *Sanders* v. *Belue*, 58 S.E. 764.

In deciding the preceding question in this manner I have been guided by the majority rule which is condensed in the following paragraph taken from 70 A.L.R. 799, to wit:

> "In most jurisdictions where a board appoints an officer, or contracts for services, and the duties of the officer or the services to be rendered are duties delegated to the supervision of the board, such appointment or contract for a period beyond the term of the board is not valid. And the same rule applies to confidential relations, such as counsel for the board."

With regard to your other inquiry as to whether the nine commissioners and administrative officers of the Capital who took possession of their offices on the 4th of January of this year are or are not a new administration, distinct from the former, I must inform you that in my opinion the Board of Commissioners is a continuing body that does not change even though the commissioners change. The same is applicable to the administrative board.

"There was no act constituting fraud in the execution of the contract alleged (one for teaching service) making the only question one of power of the board to make such a contract. The district school board is a corporation representing the district. It is a continuous body. While the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its individual members. An essential characteristic of a valid contract is that it is mutually binding upon both the parties to it." *Taylor* v. *School District*, 47 Pac. 758.

Respectfully,

B. FERNANDEZ GARCIA,
Attorney General.

I, Rafael Cabello, File clerk of the Department of Justice of Puerto Rico, Certify:

That the preceding is a true and exact copy of the opinion rendered by the Attorney General of Puerto Rico to Dr. Carlos M. de Castro, City Manager, on January 30th 1937, which appears on the files of this Department under my custody; And at the request of Gabriel de la Haba, Esq. I issue this copy which I sign and seal with the seal of the Department, this 13th day of November 1942, cancelling Internal Revenue stamps for five dollars and seventy-five cents ($5.75).

(Sgd). RAFAEL CABELLO,
File clerk, Department of Justice.